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February 26, 2024 – Via Overnight Mail

MassDEP Office of Appeals and Dispute Resolution
Case Administrator
100 Cambridge Street
Boston, MA. 02114

RE: DEP Application No.: 23-AQ01P-0017-APP, Class: NM25, Facility No.: 642477, Air Quality Plan Approval – The Prysmian Group – Brayton Point, Somerset, MA – Notice of Appeal

Dear Case Administrator,

The Somerset Residents Group[1], in accordance with the Regulations at 310 CMR 1.00 and 310 CMR 7.02(3)(h and i), do hereby submit this Notice of Appeal and request for Adjudicatory Hearing with respect to the "Air Quality Plan Approval" (the "Application") (23-AQ01P-0017-APP) issued by the Department of Environmental Protection, Southeast Region (the "Department") dated February 8, 2024 (Exhibit 1) to The Prysmian Group (the "Applicant").

PROCEDURAL HISTORY

On December 28, 2023, Prysmian Cables & Systems USA, LLC (Applicant) submitted an application to the MassDEP for a Limited Plan Application (LPA) to authorize the development of a new state-of-the-art cable manufacturing plant on a portion of the former Brayton Point Power Station site on a portion of the former Brayton Point Power Station site, in the Town of Somerset, MA. The Application was submitted in accordance with 310 CMR 7.02 Plan Approval and Emission Limitations as contained in 310 CMR 7.00 "Air Pollution Control" regulations adopted by MassDEP pursuant to the authority granted by Massachusetts General Laws, Chapter 111, Section 142 A-O, Chapter 21C, Section 4 and 6, and Chapter 21E, Section 6. MassDEP's review of the Application was limited to air pollution control regulation compliance. Applicant submitted multiple documents (not attached but referenced here) noted on the MassDEP website with Application Date 06/02/2023 Application Number #23-AQ01P0017-APP.

MassDEP determined the Application was administratively and technically complete in their letter dated February 8, 2024, and noted the Application is in conformance with the Air Pollution Control regulations and current air pollution control engineering practice, and granted the Plan Approval for said Application, as submitted, subject to the conditions in the document approval Tables 2-7 and Section 5 General Conditions.

[1] The "Somerset Residents Group" consists of Kathleen Souza, Edward Souza, Patrick McDonald, Nicole McDonald, Nancy Thomas, Peter Pelletier, Jeffrey Kardel, Charlene Faria, Edward Faria, Jodi Dupras, Denise Monroe, Paul Healey

MassDEP erred in failing to address the following points:

1. Construction Phase Concerns - Noise: MassDEP notes the Application concerns the proposed construction and operation of production equipment at the Facility. Applicant submits noise documentation for the operational phase except for the operation of the winch in the Tower manufacturing facility and MassDEP provided an air quality plan approval for the operational phase. However, Applicant fails to submit adequate documentation to address air quality for the construction phase of the operation and MassDEP erred in approving this portion of Applicant's proposal, as relates to documenting the use of the winch in the Tower and noise reduction efforts in a noise model. The duration of the construction phase is anticipated to be at least 2-3 years. The construction of the docking facility should also be evaluated, especially since there are anticipated pile-driving activities (impact-type noise) that will add to "pure tone" noise levels. These excavation and construction activities were not addressed by the Applicant.

   Specifically, what is not addressed is the anticipated level of noise and whether Applicant will conform to appropriate regulations during the construction phase. Furthermore, since there is anticipated to be some use of heavy equipment required for excavation and construction (such as pile-driving which will generate impact-type noise) Applicant should provide the additional noise modeling to assess the potential for impulse type noise during the construction which would potentially violate the second ("pure tone") prong of DAQC Policy 90-001 which states in pertinent part:

   > "This policy states that a source of noise will be considered to be violating the Department's noise regulations if the source: Produces a "pure tone" condition, which is when any octave band center frequency sound pressure level exceeds the two adjacent frequency sound pressure levels by three decibels or more."

   Applicant has not provided a listing of equipment and mitigation controls to be used during the construction phase and incorporated the anticipated noise in a model to predict and plan for mitigation needs. Additionally, the literature notes that a 3-6 dBA attenuation rate should be used per doubling of the distance to the receptor. Applicant only provided an assessment with a 6 dBA attenuation rate which is more favorable to their analysis. Applicant should provide the results of noise modeling using an attenuation rate of 3 AND 6 dBA per doubling of the distance to provide a range (or sensitivity analysis) of anticipated noise at the receptor.

   The Somerset Noise Nuisance Bylaw (Adopted August 3, 2020) notes in Section 01 "It is unlawful for any person to cause, or for any person in possession of property to allow to originate from the property, sound which has been determined a public nuisance noise." Subsection (1) notes "This section shall apply to, but shall not be limited to, prolonged unattended sounding of burglar alarms, construction and demolition equipment which characteristically emit sound but which may be fitted and accommodated with equipment such as enclosures to suppress sound, or may be operated in a manner so as to suppress sound, suppressible and preventable industrial and commercial sources of sound, and other manmade sounds that cause noise." Section 02 defines, in pertinent part, "Public Nuisance Noise" as the presence of an "amount of acoustic energy for that amount of time necessary to a) cause temporary or permanent hearing loss in persons exposed; b) otherwise be injurious,

or tend to be, on the basis of current information, injurious, to the public health or welfare; c) cause a nuisance; d) interfere with the comfortable enjoyment of life and property or the conduct of business…"

There are multiple impacts of prolonged noise exposure on the health and well-being of human beings. The US EPA Guideline "Information on Levels of Environmental Noise Requisite to Protect Public Health and Welfare with an Adequate Margin of Safety" (550/9-74-004; March 1974) notes (Appendix G):

> "Impulse noise is defined in various ways (); but generally means a discrete noise (or a series of such noises) of short duration (less than a second), in which the sound pressure level rises very rapidly (less than 500 msecs, sometimes less than 1 msec) to high peak level before decaying below the level of background noise. The decay is frequently oscillatory, because of sound reflections and reverberation (ringing) in which case the spectrum of oscillation may also be important in determining the hazard to hearing. Some authors distinguish reverberant impulse noise as "impact" noise (typically produced by metal to metal impact as in industrial forging), to distinguish it from simple oligophasic impulses (typified by a gunshot in the open air)." Table G-1 (G-2 of this reference) notes the Sound Pressure Level (SPL) for "on construction site during pile-driving" levels reaching 110-130 levels."

Hammer, et al (2014) Environ Health Perspect 122(2):115–119 notes the cardiovascular effects of disrupted sleep (as may occur with impact / impulse type noise):

> "People in noisy environments experience a subjective habituation to noise, but their cardiovascular system does not habituate (Muzet 2002) and still experiences activations of the sympathetic nervous system and changes from deep sleep to a lighter stage of sleep in response to noise. The body's initial startle response to noise is activation of the sympathetic (fight or flight) part of the nervous system, similar to the preparations the body makes just before waking in the morning. Although blood pressure normally drops during sleep, people experiencing sleep fragmentation from noise have difficulty achieving a nadir for any length of time because blood pressure rises with noise transients and heart rate increases with noise level (Haralabidis et al. 2008). Decreased quality and quantity of sleep elevates cardiovascular strain, which manifests as increased blood pressure and disruptions in cardiovascular circadian rhythms (Sforza et al. 2004)."

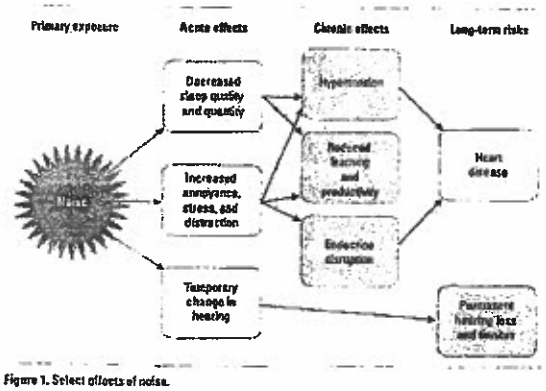


Figure 1. Select effects of noise.

"The effects of Impulse Noise on Man" result in cochlear damage and hearing loss. Impulse type of sound can lead to a startling effect and greatly impact sleep cycles.

> "Impulsive/impact noise is typically generated by the rapid release of compressed gases (impulse) or the collision of solid objects (impact) and is defined as the instantaneous change in sound pressure over a short period of time. Examples may include the impact of two metal objects, or the shooting of a firearm. The standard states that exposure to impulsive or impact noise should not exceed a 140-dB peak sound pressure level. Impulsive or impact noises are considered to be much more harmful to hearing than continuous noises. In construction, most of the 500,000 workers who are exposed to hazardous noise levels are also exposed to impulsive and impact noise sources on worksites. Impulsive and impact noise is typified by a sound that rapidly rises to a sharp peak and then quickly fades. Both are transient noises of brief duration and high intensity." (OSHA Technical Manual (OTM) - Section III: Chapter 5)

In the case of The Town of Weymouth v Mass. Dep't of Envtl. Prot. 961 F.3d 34 (1st Cir. 2020; decided Jun 3, 2020), it is acknowledged that a MassDEP witness stated "it has a "longstanding practice" -- to which its witnesses testified at the hearing -- "not to apply the Noise Policy to temporary construction sound" for purposes of air permitting, and "instead to require appropriate noise mitigation measures." However, it is not known if this is the current practice. Nor is it known what the current MassDEP definition of "temporary construction" is. It can be argued that the time between "temporary" and "permanent" construction is too vague. In the Town of Weymouth case it was noted that the proposed SoLoNOx turbine "will not run continuously…(i)nstead it will be shut down and restarted up to 416 times per year", or approximately slightly more than once a day. In that case the Applicant (Algonquin) estimated that "startups will usually last only nine minutes." (Id. At p.39) The Applicant has proposed a construction period of 2-3 years. On its face this appears to be unreasonable and very likely to be, at a minimum, a nuisance interfering with the comfortable enjoyment of life and property, as defined by the Town of Somerset Bylaw.

Furthermore, Applicant has not modeled the impact of the impact / impulse noise expected to be generated from the winch in the Tower making the cable nor the winch from the loading of the cable. Additionally, Applicant has not modeled the impact / impulse noise from the anticipated pile-driving activities related to the building of the new pier. In the absence of appropriate and validated modeling, including a manufacturers' listing of the ability of various measures to mitigate these types of noises, it is not possible to plan for the mitigating measures required to avoid these noises from being a nuisance, disrupting sleep, causing startling effects, impacting cardiovascular effects, and the inability to comfortably enjoy one's life and property.

The relief sought is to fully model the excavation / construction phase of their activities and to provide the inputs, constraints, and outputs from their models, including the impact of using an attenuation rate of 3 dBA and 6 dBA, as a sensitivity analysis to MassDEP and a 3rd party representing the Town of Somerset and available to the Public to review and comment upon during a 30-day comment period. Additionally, Applicant should provide noise modeling data that addresses impulse / impact (2nd prong – "pure tone") and other types of noise that may occur during the construction phase – on land and in the Taunton River where a new docking facility is to be built, as well as a monitoring (with appropriate equipment to assess impulse / impact type noise) and mitigation plan during the excavation / construction phase activities at the property line and at the nearest residents' homes in Somerset, Swansea and Fall River with the same review and comment period. Mitigation measures should include, but not be limited to, limited construction hours, mufflers for heavy equipment,

quieter backup alarms, portable noise barriers, and a 24-hour / day monitored complaint hotline. Appellants acknowledge that there will be "unplanned emergency events they may be unavoidable the first, and maybe second, time, but that should mandate a plan to mitigate "emergencies."

2. Operational Phase Concerns – Noise: There is a lack of data during the operational phase of Applicant's operations as relates to the generation of impulse-type noise resulting from the impact of utilizing the winch during shipboard loading that Applicant has not provided as relates to impact noise generated from the winding of the winch and potential for repeated slippage as the cable is loaded. Additionally, Applicant has not provided information on the impulse-type noise production during the construction of the cable in the tower and the potential noise generation from the use of the winch to carry the cable up and down the 600 ft tower.

   The relief sought is for Applicant to provide the inputs, constraints, and outputs from their models, including the impact of using an attenuation rate of 3 dBA and 6 dBA, as a sensitivity analysis to MassDEP and 3rd party representing the Town of Somerset and available to the Public for review and comment on the noise modeling data that addresses impulse type noise that may occur during the operational phase – related to the construction of the cable in the tower and the loading of the cable from the cable storage building to the vessel, as well as a monitoring and mitigation plan when operations are initiated.

3. Demolition and Construction Phase Concerns – Dust and Odor: 310 CMR 7.09(2) (Dust, Odor, Construction, and Demolition) notes

   > "No person responsible for any construction or demolition of an industrial, commercial, or institutional building or residential building with 20 or more dwelling units, shall cause, suffer, allow, or permit emissions therefrom which cause or contribute to a condition of air pollution. Said person shall notify the Department in writing ten working days prior to the initiation of said construction or demolition operation. The ten-working day advance notice period will be waived in the event of emergency demolition necessary to prevent a public health or safety hazard." Section 7.09(6) further notes "No persons responsible for any construction or demolition of a structure that contains friable asbestos material shall fail to comply with 310 CMR 7.09(2) and 310 CMR 7.02. (National Emission Standards for Hazardous Pollutants)"

   Applicant fails to address and MassDEP erred in granting the Air Quality Plan Approval without addressing the oil and hazardous material (Particulate Matter, Volatile Organic Compounds and Hazardous Air Pollutants) as well as history of use of asbestos material used on site that will be generated during excavation and construction phases of Applicant's activities at Brayton Point. Applicant has provided some (inadequate) data in a report titled "Phase III Subsurface Investigation Report" (October 2022; Project Number 330003274; prepared by Ramboll). This report notes approximately 300 sampling sites, however, in their own words they raise questions concerning the usability of the data by noting there is a "low bias" that could affect usability of the data presumably related to the improper collection and analysis of the samples.

   > "In multiple analysis suites, such as PAHs and EPH, surrogate spike recoveries and/or blank sample recoveries were out of criteria. While occasional recovery issues do not generally indicate

> a usability concern many SDGs had widespread issues with multiple targets out of criteria (low) in the majority of samples. These low recoveries indicate possible low biases to reported data. This low bias could affect usability."

Applicant fails to provide accurate and reliable (with documentation of the proper collection, preservation, transport and analysis, as should be documented in chain-of-custody documentation) data of oil and hazardous material and asbestos contamination levels at the site prior to conducting any excavation and construction activities which would raise dust that could be transported on winds to the local community. Applicant plans to purchase a portion of the Brayton Point property where coal and #6 fuel oil were burned to generate electricity for over 60 years. The area is known to be heavily contaminated with metals (vanadium, arsenic, nickel) and there are several Activity & Use Limitation sites on the property. The concern is that not knowing exactly where the contaminated areas are located that construction activities, on this heavily contaminated industrial site, will inadvertently create dust that will fly in the wind and contaminate residential neighborhoods, as has been documented to occur with previous activities on the site in Land Court Case No. 20 MISC 000533 (RBF) consolidated with No. 21 MISC 000155 (RBF) where Judge Foster noted, in relevant part:

> "But once dust is migrating off the site (Brayton Point site where there was a scrap metal operation) to the extent that residents can see it in the streetlights, taste it in their mouths, feel it in their noses and throats, and observe it settling on their cars, lawns, homes, and outdoor furniture, it cannot be said that the dust is being "effectively" confined to the site."

The relief sought is for Applicant to provide accurate and reliable data of the samples that they collected, including the chain-of-custody documentation to demonstrate the appropriate samples were collected in accordance with proper collection, preservation, transport and analysis techniques. In the event the samples were not representative that MassDEP require Applicant to document accordingly. Applicant cannot appropriately know the level of controls it must implement without accurately knowing the level of contamination on site and the Town of Somerset and Appellants must be reassured and know the level of potential contamination is accurate and reliable and appropriate controls are implemented. Applicant must demonstrate effective confinement of the dust and oil and hazardous materials to the site with a monitoring plan submitted to MassDEP and the Town of Somerset throughout the excavation / construction period to be reviewed by MassDEP and a 3rd party representing the Town of Somerset and available to the Public for review and comment upon during a 30-day comment period and that 3rd party must be funded by the Applicant.

4. Operational Phase – Cable Loading – Concerns – Air Pollution: Applicant notes (p.16/21 "Air Quality Plan Approval, February 8, 2024") "(t)he facility is expecting to receive up to ten (10) vessels per year, with nine (9) of the ten (10) vessels equipped for shore-to-ship power to load its cable. In addition to the use of shore power, Prysmian will incorporate best practices to mitigate sound from their own ships while at berth and require the same from non-Prysmian ships while at berth." As a note, all ships would enter port and dock under diesel power. The shore-to-ship powered ships would "hook up" to electrical power to load cable before leaving port on diesel power. The issue here is the substitution of a shore-to-ship powered ship to load the cable. Applicant requests to use a "non-Prysmian" diesel-powered ship in an emergency. Applicant does not define an emergency nor describe the process, loss

of revenue or timeline to acquire an alternative "non-Prysmian" ship (either diesel-powered or shore-to-ship capable ship to load cable) that would justify increasing emissions when the Applicant has proposed as their BACT as shore-to-ship power to load cable for all of their ships, as their base-case. Is an emergency defined as Applicant's inability to logistically plan for an unavailable ship to load their cable? The contracting process for Applicant to hire a "non-Prysmian" ship is anticipated to take several months.

Shore-to-ship power to load cable is the essential element of design inherent in the Facility's (ship's) basic design and purpose. A change in the design would result in an increase in the production of emissions (with a negative impact on the local community and the environment), the opposite of the desired design.

Appellants claim MassDEP did not follow its own established procedures for assessing whether allowing Applicant to use a "non-Prysmian" diesel-powered ship was an allowable alternative under the Best Available Control Technology analysis and therefore they must conduct that analysis to be in compliance with their own policies and procedures. We find MassDEP's failure to mandate the BACT analysis arbitrary and capricious (Cent. Me. Power Co. v. FERC, 252 F.3d 34, 40 n.3 (1st Cir. 2001). "An agency action may be set aside as arbitrary and capricious if the agency fails to 'comply with its own regulations.'" (quoting Environmental, LLC v. FCC, 661 F.3d 80, 85 (D.C. Cir.2011))); Tofias v. Energy Facilities Siting Bd., 757 N.E.2d 1104, 1111 (Mass. 2001); Town of Northbridge v. Town of Natick, 474 N.E.2d 551, 556 (Mass. 1985) cited by The Town of Weymouth v Mass. Dep't of Envtl. Prot. 961 F.3d 34 (1st Cir. 2020; decided Jun 3, 2020 at p.26.

MassDEP in The Limited Plan Application (LPA) does not contemplate / discuss "non-Prysmian" ships utilizing "diesel-powered" vessels, but rather only "non-Prysmian" shore powered ships (p. 16/21). MassDEP and Prysmian did not attempt to perform the required mathematical calculations and MassDEP must make an independent determination for purposes of BACT.

MassDEP erred in not mandating that Applicant provide adequate information on the selection process and requirements that will be imposed on the one "non-Prysmian" ship (shore-to-ship versus diesel-powered) while at berth per year. This "non-Prysmian" ship, if utilizing diesel-power, would be running diesel while in port to load the cable 24/7 for up to 15 days. Applicant has also requested that it may have need for a second "non-Prysmian" ship within a 12-month rolling period separated by at least a 4-month period, essentially constituting 2 "non-Prysmian" "diesel-powered" ships during a 12-month period. Applicant did not indicate it would provide a list (prior to hiring and utilizing a "non-Prysmian" diesel-powered ship) of available ships that would meet the expectations of 310 CMR 7.02(8) to ensure the "Best Available Control Technology" was complied with and how they would mandate the contracted "non-Prysmian" ship to comply with applicable standards.

310 CMR 7.02(8)(a)(2) states, in pertinent part,

> "Best Available Control Technology (BACT). BACT is required of all LPA approvals and CPA approvals. In no case will BACT be less stringent than any applicable emissions limitation

> contained in a Department regulation (e.g., 310 CMR 7.05, 7.18, 7.19, 7.24, 7.26 or 7.29) or federal regulation (e.g., 40 CFR 60, 61 or 63)." (Emphasis Added.)

Applicant has not submitted a BACT for the use of a "non-Prysmian" shore-to-ship or diesel-powered ship. Shore-to-ship power does not have any emissions. There would not be any emissions to limit with the use of shore-to-ship power, however the use of a "non-Prysmian" diesel-powered ship would have emissions that should be evaluated through the BACT process. It appears Applicant is proposing to use a "less stringent" (more polluting) control technology by reverting to a diesel-powered ship technology instead of using a "non-Prysmian" shore-to-ship powered vessel in violation of 310 CMR 7.02(8)(a)(2) which states in "no case will BACT be less stringent than any applicable emissions limitations."

In the event a BACT Analysis is required, as relates to the use of shore-to-ship versus diesel-powered ships to load cable, Applicant has identified BACT for their specific application of loading cable onboard its ships as shore-to-ship power, except in an "undefined" emergency.

The top-down BACT analysis specified at 310 CMR 7.02(8)(a)(2) requires that all available control technologies be ranked in descending order of control effectiveness. The most stringent or "top" control option is the default BACT emission limit unless the applicant demonstrates, and MassDEP agrees, that energy, environmental, and/or economic impacts justify the conclusion that the most stringent control option is not achievable in that case. Upon elimination of the most stringent control option, the next most stringent alternative is evaluated in the same manner. This process continues until a BACT is selected.

The five steps in a top-down BACT evaluation can be summarized as follows:

Step 1. Identify all possible control technologies
Step 2. Eliminate technically infeasible options
Step 3. Rank the technically feasible control technologies based upon emission reduction potential
Step 4. Evaluate ranked controls based on energy, environmental, and/or economic considerations
Step 5. Select BACT

In the case at hand the control technology with the most stringent or "top" control option is shore-to-ship powered ships to load cable and therefore the default BACT. Applicant proposes going to a less stringent technology (diesel-powered ships) than the one currently Applicant's choice – shore-to-ship powered ships.

MassDEP regulations provide two alternative options for defining BACT for minor sources such as the type of ship (facility):

1. BACT can be defined as "Top Case" in lieu of an emissions unit-specific top-down analysis. Under 310 CMR 7.02(8)(a)(2)(a), the Top Case is the "level of control from the most recent plan approval or other action issued by the Department;" and/or
2. Applicants can identify BACT for their specific application using a top-down BACT analysis, consistent with MassDEP guidance (and EPA guidance by reference). (Citing Trinity Consultants, Addendum to Non-Major Comprehensive Plan Approval Application Transmittal No. X266786: BACT Analysis for EMD Alternative dated August 7, 2020)

Applicant has identified BACT for their specific application of loading cable onboard its ship as shore-to-ship power. As described below, MassDEP's own regulations, its BACT guidance, and its Top Case BACT guidelines apply Top Case BACT to the specific emission source and specific fuel proposed by a permit applicant. *Id.* Accordingly, it would be inconsistent with these authorities to permit Applicant to use a "non-Prysmian" diesel-powered ship – and thus the substitution of one fuel or energy source for another – to satisfy BACT requirements in this case. However, it would appear to be consistent for Applicant to utilize a "non-Prysmian" shore-to-ship ship to load cable.

Alternatively, and as additional grounds for excluding a "non-Prysmian" diesel-powered ship to load cable as BACT, the Addendum also demonstrates that a top-down BACT analysis for the Facility shows that a "non-Prysmian" diesel-powered ship to load cable is not BACT because:

1. Substituting a diesel-powered ship for a ship-to-shore powered ship to load cable onto the ship (facility) would improperly substitute or "redefine the source." A "non-Prysmian" diesel-powered ship to load cable is therefore properly excluded in Step 1 from further consideration; and/or, independently and alternatively. (Adapted from *Id.*)

MassDEP's definition of BACT does not support consideration of a "non-Prysmian" diesel-powered ship to load cable as BACT for a Prysmian shore-to-ship OR "non-Prysmian" shore-to-ship powered ship because an "non-Prysmian" diesel-powered ship is inconsistent with the "facility," "application," or "emission unit" as proposed by Prysmian at their facility, to include a ship.

A "non-Prysmian" diesel-powered ship is not an element of Applicant's Facility (including ship). The Section 7.00 definition of BACT allows MassDEP to evaluate the "application of production processes and available methods, systems and techniques for control" only for "such facility (ship)." The phrase "such facility" refers to the "regulated facility" (or ship) that has been proposed by the applicant and that is the subject of the LPA proceeding. A "non-Prysmian" diesel-powered ship is not an element of the regulated facility proposed by Prysmian. See 310 CMR 7.00. (Adapted from *Id.*)

A "non-Prysmian" diesel-powered ship is not Applicant's proposed application. MassDEP's regulations further clarify that BACT is specific to the "application" (i.e., the facility (ship) that Prysmian proposes to use) as proposed by the applicant: "Applicants shall identify BACT for their specific application using a top-down BACT analysis." *Id.* 7.02(8)(a)(2) (Emphasis Added).

A "non-Prysmian" diesel-powered ship is not Applicant's proposed emission unit. MassDEP's regulations further clarify that BACT is specific to the "emission unit" as proposed by the applicant: "In lieu of an emission unit-specific top-down BACT analysis, an applicant may propose an emission control limitation by using [a Top Case approach]." Id. (emphasis added). This means that the BACT evaluation is conducted on the specific emission unit proposed by an applicant, not a different kind of emissions unit, or indeed, an alternative that produces no emissions at all. (Adapted from Trinity Consultants, Addendum to Non-Major Comprehensive Plan Approval Application Transmittal No. X266786: BACT Analysis for EMD Alternative dated August 7, 2020)

MassDEP's evaluation of production processes and available systems and techniques for control is limited to the specific facility (ship), application, and emission unit that is the object of an application for a plan approval—in this case a Prysmian shore-to-ship powered ship capable of loading cable. Therefore, Massachusetts regulations do not support consideration of a "non-Prysmian" diesel-powered ship in the BACT analysis because a "non-Prysmian" diesel-powered ship is a different facility (ship), application, or emission unit from the shore-to-ship ship proposed. (Adapted from Trinity Consultants, Addendum to Non-Major Comprehensive Plan Approval Application Transmittal No. X266786: BACT Analysis for EMD Alternative dated August 7, 2020)

A "non-Prysmian" diesel-powered ship capable of loading cable from Applicant is not a BACT under any approach. A "non-Prysmian" shore-to-ship powered ship capable of loading cable from Applicant would appear to be a BACT under the above approaches.

MassDEP BACT Guidance at 3. In turn, the EPA's New Source Review Workshop Manual explicitly states: "Historically, EPA has not considered the BACT requirement as a means to redefine the design of the source when considering available control alternatives." NSR Workshop Manual at B.13. (Adapted from Trinity Consultants, Addendum to Non-Major Comprehensive Plan Approval Application Transmittal No. X266786: BACT Analysis for EMD Alternative dated August 7, 2020) By utilizing a "non-Prysmian" diesel-powered ship Applicant would be redefining the source (of power to load the cable).

EPA's Two-Part Test for Determining Whether a Control Alternative Redefines the Source. The United States Court of Appeals for the Ninth Circuit has summarized the EPA's two-part test for determining when the evaluation of an alternative production process as a control technology veers into an illegitimate redefinition of the source proposed by the permit applicant. (*Id.*)

> First, "the permit applicant initiates the process and . . . defines the proposed facility's end, object, aim or purpose—that is the facility's basic design." The purpose must be "objectively discernable." Additionally, the applicant's proposed definition "must be for reasons independent of air permitting" and cannot be motivated by cost savings or avoidance of risks.
>
> Second, EPA takes a "hard look" at the proposed definition to determine which design elements are inherent to the applicant's purpose and which elements can be changed to reduce pollutant emissions without disrupting the applicant's basic business purpose. (*Id.*)

Over time, EPA has applied the redefining the source doctrine in numerous contested permit proceedings, two of which have been upheld by United States Courts of Appeals.[2] Two categories of these cases are most relevant to Algonquin's BACT analysis of the Facility: (1)

[2] *In re Sierra Pacific Indus.*, PSD App. 13-01, 2013 WL 3791510 (Envtl. App. Bd., July 18, 2013), aff'd sub nom Helping Hands Tools v. Envtl. Prot. Agency, 848 F.3d 1185; *In re Prairie State Generating Co.*, PSD App. No. 05-05, 2006 WL 2847225 (Envtl. App. Bd., Aug. 24, 2006), aff'd sub nom Sierra Club v. Envtl. Prot. Agency, 499 F.3d 654.

cases evaluating facilities co-located with sources of fuel, energy, or raw materials; and (2) cases evaluating switching a fuel or source of energy from that proposed by the applicant. (*Id.*)

The relief sought is for MassDEP to mandate Applicant to submit a BACT analysis and to only use "non-Prysmian" shore-to-ship ships to load cable when they are not able to utilize their own shore-to-ship powered ships for cable loading. In the alternative, if MassDEP grants Applicant permission to use "non-Prysmian" diesel-powered ship, the relief sought is for Applicant to provide a list of potential "non-Prysmian" diesel-powered ships, and for Applicant to submit a BACT assessment as contemplated by 310 CMR 7.02(8)(a)(2) and subsequently seek approval from MassDEP at least 6 months in advance of the anticipated use of a "non-Prysmian" diesel-powered ship. MassDEP should mandate that Applicant conduct an BACT analysis PRIOR to hiring a "non-Prysmian" diesel-powered ship for MassDEP and the Town of Somerset to review and agree on the analysis that supported Applicant's selection of a "non-Prysmian" diesel-powered ship that would not significantly adversely impact the local air quality.

Applicant must comply with 310 CMR 7.02(8)(a)(2) and submit the BACT analysis to MassDEP and the Town of Somerset to be reviewed by MassDEP and a 3rd party representing the Town of Somerset and available to the Public for review and comment upon during a 30-day comment period.

For all the foregoing reasons, it is requested that MassDEP provide guidance in accordance with 310 CMR 7.00 and mandate Applicant provide the requested information.

Enclosed please find a copy of our check in the amount of One Hundred and 00/100 Dollars ($100) as payment of the fee for this request, together with a copy of the fee transmittal form which has been sent to the Department's lock box.

Thank you for your attention and consideration in this matter. Should you have any questions or need additional information, please do not hesitate to contact me.

Respectfully submitted for your consideration,

Kathleen Souza on behalf and in collaboration with the "Somerset Residents Group"

cc: Mr. Mark Poudrier, MassDEP – Southeast Regional Office, 20 Riverside Drive, Lakeville, MA 02347
Mr. Alberto Boffelli, The Prysmian Group, 75 Arlington Street, Boston, MA. 02116

Attachments:

1. Adjudicatory Hearing Fee Transmittal Form
2. Copy of check
3. Mass DEP Limited Plan Application from The Prysmian Group ePlace Authorization No.: AQ)1P-0000176, Facility No.: 642477 "Air Quality Plan Approval."
4. Affidavits

Massachusetts Department of Environmental Protection 51

Adjudicatory Hearing Fee Transmittal Form

IMPORTANT! This form is intended for fee transmittal only. The contents of a request for an adjudicatory appeal (Notice of Claim) are established at 310 CMR 1.01(6) and the substantive statutes and regulations governing the Department's action.

A. Person/Party Making Request

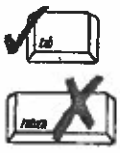
1. Name and address of person or party making request:

Kathleen Souza on behalf of Somerset Residents Group
Name - If appropriate, name group representative

130 Pocasset Street
Street Address

Somerset	MA	02725
City	State	Zip Code

Important: When filling out forms on the computer, use only the tab key to move your cursor - do not use the return key.



2. Project Information:

1 Brayton Point Road
Street Address

Somerset	MA	02725
City	State	Zip Code

23-AQ01P-0017-APP	$100.00
DEP File or ID Number	Amount of filing fee attached

Email Address

B. Applicant (If applicable)

1. Name and address of applicant:

Kathleen Souza on behalf of Somerset Residents Group
Name - If appropriate, name group representative

130 Pocasset Street
Street Address

Somerset	MA	02725
City	State	Zip Code

kathysouza317@gmail.com
Email Address

C. Instructions

1. Send this form and check or money order of $100.00 payable to the Commonwealth of Massachusetts to the MassDEP Lockbox at:

   Department of Environmental Protection
   P.O. Box 4062
   Boston, MA 02211

2. Send a **copy** of this form and a **copy** of the check or money order with the Request for Adjudicatory Appeal (Notice of Claim) to:

   MassDEP Office of Appeals and Dispute Resolution
   Case Administrator
   100 Cambridge Street, Suite 900
   Boston, MA 02114